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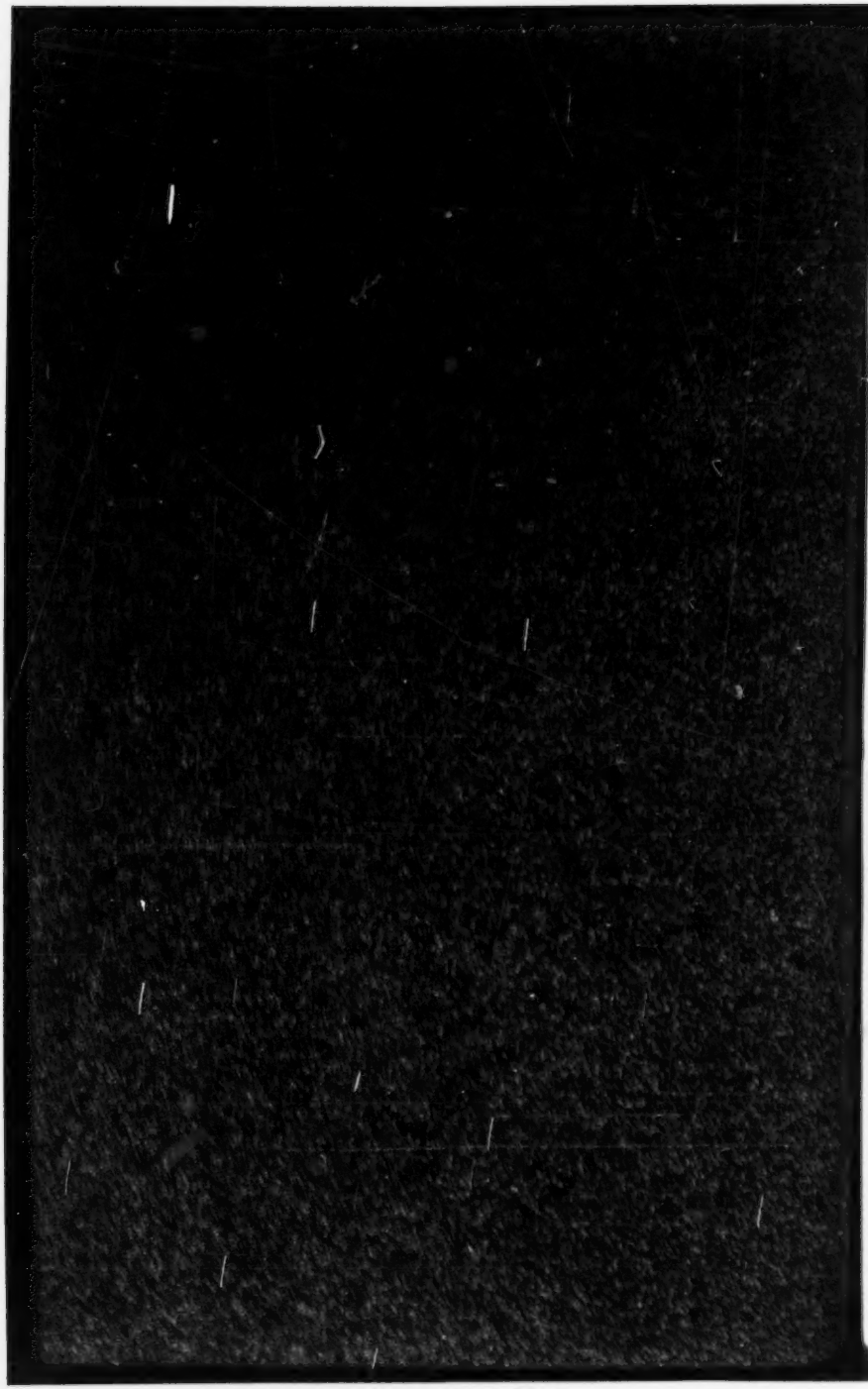

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 14—Original.

Ex Parte: IN THE MATTER OF U. S. JOINS,

PETITIONER.

Petition for Writs of Prohibition and Certiorari to the Choctaw and Chickasaw Citizenship Court.

Supplemental Brief and Reply Brief of Petitioner to Briefs Filed Respectively by the United States and by the Choctaw and Chickasaw Nations in Opposition to Petition for Writs of Prohibition and Certiorari.

Statement.

On March 23, 1903, this Honorable Court granted petitioner's motion to file petition for writs of prohibition and certiorari against the Choctaw and Chickasaw Citizenship Court, and each of the judges and the clerk thereof, and on that day made a rule against said court, and each of its judges and the clerk thereof to show cause October 19, 1903, at 12 o'clock, noon, or as soon thereafter as counsel can be heard, why writs of prohibition and *certiorari* should not be granted as prayed in the petition.

Each of the judges and the clerk of said Citizenship Court has been duly served with a copy of said petition and the rule to show cause. Prior to March 23, 1903, the Choctaw and Chickasaw Nations, by their counsel, filed herein reply and brief in opposition to petitioner's motion for leave to file the petition. In this reply none of the material allegations in the petition are denied. The record shows that on the 24th day of August, 1903, the judges and the clerk of said Citizenship Court filed herein what is termed a "Reply, Answer and Return to the Rule and Order to them issued, to show cause why writs of prohibition and certiorari should not be granted against them as prayed for by the petitioner." This reply was not printed and counsel did not receive a copy thereof and did not know of its existence until October 15, 1903. In this reply the respondents do not attempt to deny any of the material allegations of the petition, but in effect admit them to be true. They state, first, that when the petitioner applied to this honorable court for permission to file a petition for writs of prohibition and *certiorari*, that they had previous thereto rendered the judgment of which petitioner complains, in the case of Choctaw and Chickasaw Nations *vs.* J. T. Riddle *et al.*, under Section 31 of the Act of Congress of July 31, 1902 (32 Stats. at L., 641), and had certified said judgment to the Commission of the United States to the Five Civilized Tribes (known as the "Dawes Commission"), and as the judgment so rendered was self-executing, the case had passed beyond the jurisdiction of the Citizenship Court and was at an end.

2. They state petitioner, by acts by him done subsequent to the institution of the prohibition proceedings herein, has estopped himself from questioning the jurisdiction of the Citizenship Court in the Riddle case, and estopped himself from denying the constitutionality of Section 31 of the Act of Congress, *supra.*

3. They say, inasmuch as the members of the tribes of Choctaw and Chickasaw Indians, at an election held September 25, 1902, by a majority vote ratified the said Act of Congress creating said Citizenship Court; and, inasmuch as petitioner *claims* to be an *Indian*, he is bound by said Act of Congress because of its ratification by votes of Choctaws and Chickasaws whose rights as members of the tribes had not been questioned. October 10, 1903, the Solicitor General, in behalf of the United States, filed a brief herein in opposition to the petition. In this brief he makes a statement of the history of the litigation which, in substance and in the main, is admitted to be correct. The last-named brief was not received by counsel for petitioner until October 16, 1903. This supplemental brief and brief in reply, with permission of this honorable court, is filed and is intended as an additional brief to brief heretofore filed by petitioner and as a reply brief to briefs filed herein by the United States and the Choctaw and Chickasaw Nations, as stated.

1st. Has this honorable Court the jurisdiction and power to grant the writ of prohibition as prayed for?

"The Supreme Court shall have power to issue writs of prohibition in the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul or vice-consul is a party." (*Sec. 688, p. 127, Rev. Stat. U. S.*)

Concerning the jurisdiction of this Court to grant writs of prohibition, in Smith *vs.* Whitney, 116 U. S., 173, speaking through Mr. Justice Gray, this honorable Court said:

"It is often said that the granting or refusing of a writ of prohibition is discretionary, and therefore not the subject

of a writ of error. That may be true, where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court whose action is sought to be prohibited is doubtful, or depends on facts which are not made matter of record, or where a stranger, as he may in England, applies for the writ of prohibition. But where that court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as matter of right, and a refusal to grant it, where all the proceedings appear of record, may be reviewed on error. This is the clear result of the modern English decisions, in which the law concerning writs of prohibition has been more fully discussed and explained than in the older authorities. *In re* Forster, 4 B. & S. 187, 199; Mayor, &c., of London *vs.* Cox, L. R. 2 H. L., 239, 280; Worthington *vs.* Jeffries, L. R. 10 C. P., 379, 380; Chambers *vs.* Green, L. R. 20 Eq., 552, 555. See also Weston *vs.* City Council of Charleston, 2 Pet., 449, reversing on error S. C., Harper, 340."

In re Rice, Petitioner, 155 U. S., 402, speaking for the Court, Mr. Chief Justice Fuller said:

"Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy of appeal or otherwise, or where the question of jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings." Citing Smith *vs.* Whitney, 116 U. S., 167, 173; *In re* Cooper, 143 U. S., 472, 495.

Again, in *In re* New York and Porto Rico Steamship Co., petitioner, 155 U. S., 523, 531, Mr. Chief Justice Fuller said:

"We have recently thus stated the principles applicable to the issue of the writ of prohibition, in *In re* Rice, *ante*, 396, 'where it appears that the court, whose action is sought to be prohibited, has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset and has no other remedy is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings. Smith *vs.* Whitney, 116 U. S., 167, 172; *In re* Cooper, 143 U. S., 472, 495.'

"Without reviewing the action of the district court on its merits, it certainly cannot be said that that court was clearly without jurisdiction, or that petitioners were without other remedy; for in the event of a decree against them, they could appeal directly to this Court on the question of jurisdiction or to the Circuit Court of Appeals upon the whole case, and that court might certify the question to this Court for decision. *Ex parte* Morrison, 147 U. S., 114, 126; United States *vs.* Jahn, 155 U. S., 109."

Section 1, Article 3, of the Constitution of the United States reads:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.
* * *

"Sec. 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws

of the United States and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens or subjects.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have *appellate* jurisdiction, both as to law and fact, with such *exceptions*, and under such regulations as the Congress shall make."

Prohibition is a common law writ, and is designed to prevent excess of jurisdiction on the part of the court assuming to exercise same, and we submit will issue in all cases when the court against whom it is directed acts wholly without jurisdiction, or exceeds its jurisdiction.

In re Cooper, 143 U. S., 472.
In re Morrison, 147 U. S., 33.

Section 688 of the Revised Statutes, copied *supra*, was not intended to confine this Court, in the exercise of jurisdiction in prohibition proceedings to proceedings against district courts when proceeding as courts of admiralty and maritime jurisdiction, but was intended to establish simply the practice and procedure of the court in prohibition proceedings against the district courts sitting as courts of admiralty or exercising maritime jurisdiction.

Section 2, Article 3, of the Federal Constitution makes it clear that this honorable Court can properly exercise appellate jurisdiction of all cases therein mentioned, except

those of which the Court is given original jurisdiction, and except such cases as Congress shall except from the rule.

The writ of prohibition applied for in this case arises under a treaty made between the United States and the Choctaw and Chickasaw tribes of Indians, and clearly fall within the purview of Section 2, Article 3, of the Constitution. The writ applied for is a common law writ, and as its issuance has not been prohibited by act of Congress, it goes without saying this honorable Court has the power and jurisdiction to entertain the petition filed therefor—especially since it is sought by the writ to prevent the effect of a void judgment rendered by a court created by treaty or act of Congress.

If relief cannot be had in this way from this Court, then the petitioner is without a forum wherein the wrongs and grievances of which he complains can be adjusted. There is no court under the law to which the case could be presented by appeal or error. He must submit to the cancellation of the judgment he obtained in a court of competent jurisdiction—and upon which judgment he has relied and by reason of which he has expended large sums of money, just because the legislative branch of the Government by judicial legislation has attempted to grant the Chickasaw Nation a new trial through the agency of the Choctaw and Chickasaw Citizenship Court. We had not considered the question of this Court's jurisdiction to grant the writ as a serious one, and discuss the question at length, because counsel for respondents in briefs heretofore filed have attempted to raise the question. To our minds, in view of the recent decisions of this Court, and the modern English decisions, some of which the Court have cited, the question of this Court's jurisdiction is not an open one, but that it is now well settled that when the inferior court without jurisdiction, or under an

assumed jurisdiction, renders and causes to be entered a judgment from which the aggrieved party has no remedy by appeal or writ of error (as in this case) that this honorable Court, upon proper application, will grant the writ of prohibition to prevent the effect of the void judgment so rendered.

Second. Is Section 31 of the Act of Congress of July 1, 1902 (32 Stat., 641), unconstitutional, as alleged by petitioner, because of its judicial nature, and because, as alleged, it is an attempt on the part of the legislative branch of the Government to cancel, annul and set aside final decrees of a court of competent jurisdiction?

The first act of Congress which was decided to be unconstitutional was that of March 23, 1792 (1 Stat. at Large, 243), requiring circuit courts of the United States to examine into the claims of the officers, soldiers and seamen of the Revolution to the pensions granted to invalids by that act, and to determine the amount of pay that would be equivalent to the disability, and to certify their opinion to the Secretary of War. The act authorized the Secretary, when he had cause to suspect imposition or mistake, to withhold the pension allowed by the Court, and to report the case to Congress at its next session. The question was never reported to the Supreme Court *in banc*, but the concurrent opinions of Chief Justice Jay and Justices Cushing, of the Supreme Court; of Duane, District Judge of the New York Circuit; of Justices Wilson and Blair, of the Supreme Court; of Peters, District Judge of the Pennsylvania Circuit; of Justice Iredell, of the Supreme Court, and Sitgreaves, District Judge of the North Carolina Circuit, were all to the effect that the act required of them was not a judicial one, because subject to the revision of the Secretary of War and Congress. These opinions were communicated to the President and to Congress, resulting in the repeal of the act at the next session of Congress. The

judges of the courts mentioned *supra* addressed letters to the President of the United States, pointing out the unconstitutionality of the act. They stated the "business directed by the act was not of a judicial nature. It forms no part of the power vested by the Constitution in the courts of the United States, and because if upon that business the Court had proceeded, its judgments might, under the same act, have been revised and controlled by the Legislature and by an officer in the Executive Department." Such revision and control by the judges was deemed radically inconsistent with the independence of that judicial power which is vested in the courts, and consequently, with that important principle which is so strictly observed by the Constitution of the United States.

It was further stated:

"That whatever doubt may be suggested, whether the power in question is properly of a judicial nature, yet inasmuch as the *decision* of the court is not made *final*, but may be at least suspended in its operation by the Secretary of War if he shall have cause to suspect imposition or mistake; this subjects the decision of the court to a *mode of revision* which we consider to be unwarranted by the Constitution; for though Congress may certainly establish, in instances not yet provided for, courts of *appellate* jurisdiction, yet such courts must consist of judges appointed in the manner the Constitution requires, and holding their offices by no other tenure than that of their good behavior, by which tenure the office of Secretary of War is not held. And we beg leave to add, with all due deference, that no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the Constitution, be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachment."

See Hayborn's Case, 2 Dallas, 409.

In ex parte Garland, 4, Wall., 333, this honorable Court in effect held that the admission by the Court of petitioner, Garland, to practice therein was a judicial act, and that the Act of Congress of January 24, 1865, providing that after its passage no person shall be admitted as an attorney and counsellor to the bar of the Supreme Court, and, after March 4, 1865, to the bar of any circuit or district court of the United States, or Court of Claims, until a certain oath therein mentioned had been taken, was unconstitutional on the ground that said act was tantamount to a legislative decree, and an attempt on the part of the legislature to interfere with the judgment of the Court.

On page 159 of Sedgwick on the Construction of Statutory and Constitutional law (2 Ed.), Mr. Sedgwick advances the following conclusions upon the limits to which judicial legislation should go:

First. "That the legislature is to confine itself to its function of 'making laws'; and we have considered the general features and characteristics of a law. The imperfection of language does not permit us to define with absolute precision the meaning of the term 'law', but each case must depend on its peculiar features."

Second. "That it is the right and duty of the judiciary to repress and confine the legislative body within the true limits of the law-making power; but that they have no right whatever to set aside, to arrest, or nullify a law passed in relation to a subject within the scope of the legislative authority, on the ground that it conflicts with their notions of natural right, abstract justice or sound morality."

Mr. Ordronaux, on page 426 of his work on Constitutional Legislation, correctly states the rule to be:

"If a legislative act be made in contravention of the Constitution, it is manifestly no law, and as it is the duty of courts to administer that only which is law, there can

be no choice allowed then in the matter of declaring such a statute to be invalid. They cannot be bound by it, since it is a violation of the paramount law, which being the supreme law of the land weighs with equal force upon all courts alike. Says C. J. Marshall: 'If both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution and not such ordinary act must govern the case to which they both apply. Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law.'"

On page 114, *et seq.*, Cooley's Constitutional Limitations (5 Ed.) it is stated:

"As the legislature cannot set aside the construction of the law already applied by the courts to actual cases, neither can it compel the courts for the future to adopt a particular construction of a law which the legislature permits to remain in force. 'To declare what the law is, or has been, is a judicial power to declare what the law shall be, is legislative. One of the fundamental principles of all our governments is, that the legislative power shall be separate from the judicial.' If the legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute, and cannot be done by a mandate to the courts, which leaves the law unchanged, but seeks to compel the courts to construe and apply it, not according to the judicial, but according to the legislative judgment. But in any case the substance of the legislative action should be regarded rather than the form; and if it appears to be the intention to establish by declaratory statute a rule of conduct for the future, the courts

should accept and act upon it, without too nicely inquiring whether the mode by which the new rule is established is or is not the best, most decorous, and suitable that could have been adopted.

"If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is plain it cannot do so directly, by setting aside their judgment compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry. And as a court must act as an organized body of judges, and, where differences of opinions arise, they can only decide by majorities, it has been held that it would not be in the power of the legislature to provide that, in certain contingencies, the opinion of the minority of a court, vested with power by the Constitution, should prevail, so that the decision of the court in such cases should be rendered against the judgment of its members."

In the case of State of Pennsylvania *vs.* Wheeling & Belmont Bridge Co., 59 U. S. (18 How.), 421, on page 431, this honorable Court said:

"But it is urged that the act of Congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it.

"The case before us, however, is distinguishable from this class of cases, so far as it respects that portion of the decree directing the abatement of the bridge. Its interference with the free navigation of the river constituted an obstruction of a public right secured by acts of Congress."

In Calhoun *vs.* McLendon, 42 Ga., 405, the supreme court of that State held that an act of the legislature declaring a single person to be the head of a family is judicial

legislation and unconstitutional, because in contravention of the decision of that court defining the head of a family under the State constitution. The decision of the court was held to be paramount.

In the case of Milam County *vs.* Bateman, 54 Tex., 154, quoting from the syllabi, the supreme court of Texas said:

"The Act of July 21, 1870, under which the legislature attempted for the relief of settlers on Milam County school lands, to authorize the issuance of patents in violation of the law, as already decided by the supreme court, was judicial and not legislative and was unconstitutional.

"The legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts in the exercise of their jurisdiction have made; this would not only be the exercise of judicial power, but would be its exercise in its most objectionable form. Such a doctrine would make the legislature a court of review, to which parties might appeal when dissatisfied with the rulings of a court."

In section 31, page 36, Wade on Retroactive Laws, the rule is concisely stated:

"The question whether a statute operates upon past transactions is one peculiarly for judicial determination. A law will not receive a retroactive construction merely because a subsequent statute declares that it was so intended. Whatever force a declaratory statute may have must be prospective with reference to the statute construed. Where it may be legally enacted that an existing statute shall be interpreted so as to affect particular cases not previously included in express terms, such declaratory or expository statute will be inoperative to affect causes arising under the original statute prior to the declaratory act. This rule restricts the operation of statutes declaring the meaning of former enactments to causes arising subsequent to the statute by which the language of the prior act is interpreted, for the reason that an admission of the existence of legisla-

tive control over past controversies by means of statutes declaratory of the meaning of previous laws, would amount to an acquiescense in legislative usurpation of judicial powers. Such a concession would be a most dangerous surrender by one of the several branches of the Government to a co-ordinate branch. The principles upon which this restriction upon legislative authority is based are very ably and comprehensively laid down by Judge Cooley. Says the learned author in this connection: 'It is always competent to change existing law by a declaratory statute, and when the statute is only to operate upon future cases, it is no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future.

"'But the legislature cannot be made to act upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would, in effect, sit as a court of review, to which parties might appeal when dissatisfied with the rulings of the courts.' It was held, in harmony with the spirit of this doctrine, that an act of the legislature declarative of the jurisdiction conferred by a former statute might take effect and confer the jurisdiction declared to exist, so as to affect future cases, but it would be utterly inoperative upon causes arising between the dates of the two acts. For similar, and perhaps even stronger reasons, would a statute of this nature, which undertook, by declaring the intention of a prior legislative act, to make it retroactive, be regarded as a usurpation of authority by the Legislature."

In Lambston *vs.* Hogan, 2 Pa. St., 22, the supreme court of that State held where an act of the legislature has received a judicial construction, a remedial act will always be construed to extend to future cases, and that the legislature have not the constitutional power, by such acts, to impair or affect rights acquired or existing under such a construction.

In Missouri it is held that a statute decloratory of the meaning of a former statute can have no force or effect as to *past controversies*, but it will control future cases. (McNichol *vs.* The U. S., Mo. Rep. Og., 74 Mo., 457.)

In Denny *vs.* Mattoon, 84 Mass., 361 (79 Am. Dec., 784), it was held that the legislature has no power to validate or confirm insolvency proceedings, which were commenced by petition of creditors, and had before a person claiming to act as judge of insolvency, but with no title to the office, and which have been adjudged invalid by a decree of the highest court of the State.

In Gorman *vs.* Sinking Fund Comrs. (Virginia Coupon Cases), 25 Fed. Rep., 647, it was held by the Circuit Court of the Eastern District of Virginia that where a statute is passed by a legislature declaratory of the meaning of a statute previously passed by that body, such interpretative act cannot be *retrospective* in its operation, and deprive the courts of the power to put their own interpretation upon the original statute and determine rights vested under it prior to the passage of the interpretative statute.

By an act of the Assembly of the State of Maryland (1872, Gh. 310), it was enacted "that the Court of Appeals be and they are hereby authorized and empowered to reopen and rehear." The cases named, "and upon hearing thereof, to pass such judgments, orders and decrees in the said several cases asright and justice may require."

The supreme court of Maryland in passing on this act held it was unconstitutional as an attempt on the part of the legislature to exercise judicial powers. Dorsey *vs.* Dorsey, 37 Md., 64; 11 Am. Rep., 528.

In Griffin's Ex'or, *vs.* Cunningham, 20 Grott. 31, the supreme court of Appeals of Virginia held that the proviso

to Section 2 of the Act of March 5, 1870, called the enabling act, which authorized the Court of Appeals, organized under the present Constitution, to rehear and affirm or reverse the decrees made by the military judges, at its term, commencing the 11th of January, 1870, the term having ended before the passage of the act, is unconstitutional, and the present court has no authority to rehear such cases.

In Teel *vs.* Yancey, 23 Grott., 691, the same court held, that the Act of March 5, 1870, commonly called the Enabling Act, is a valid act, except the proviso which authorizes the Court of Appeals to *review* the decisions of the Court of Appeals organized under the reconstruction acts; and that the district courts of appeal, sitting in December, 1869, had jurisdiction to hear and decide the causes then pending therein.

To the same effect, see Hooker *vs.* Hooker, 18 Miss., 5, 99.

In Oliver *vs.* McClure, 28 Ark., 555, it was held by the supreme court of that State that it is competent for the legislature to change remedies, process, etc., before judgment; but when the right is judicially ascertained, they cannot interfere with the process to enforce that right that materially renders the right less efficient than that in existence when the contract was made.

Has Congress the power to grant a new trial from a judgment which has become final? And by which vested rights have been established and enjoyed—and subject the party in whose favor rendered to the hazard, risk, and expense of a farther hearing, when by the very act which gave the trial court the authority to enter this judgment, it is unequivocally provided that the judgment of that court should be final.

If the legislative branch of the government were permitted to override the judicial—to reopen and retry matters which had once been settled—to make prospective that which had once been final—and at will to disturb the solemnity of a final judgment of a court, then the stability and confidence in the final action of the Judicial Department will forever be shattered.

Vested right. What is? See

Steamship Company *vs.* Joliffe, 2 Wall, 450;
Wade on Retroactive Laws, Sec. 157;
Black on Constitutional Law, Sec. 154;
Lowe *vs.* Harris, 17 S. E., 539;
3 Amer. & Eng. Ency. Law, 758, 2nd Ed.

The case of McCollough *vs.* The Commonwealth of Virginia, 172 U. S., 123, contains the expression from this Court on a question of this character:

"But there are more substantial reasons than this for not entertaining this motion. At the time the judgment was rendered in the Circuit Court of the City of Norfolk the Act of 1882 was in force, and the judgment was rightfully entered under the authority of that Act. The writ of error to the Court of Appeals of the State brought the validity of that judgment into review, and the question presented to the Court was whether at the time it was rendered it was rightful or not. If rightful, the plaintiff therein had a vested right which no State legislation could disturb. It is not within the power of the legislature to take away rights which have once been vested by a judgment. Legislation may act on subsequent proceedings, but when those actions have passed into judgment the power of the legislature to disturb the right thereby created ceases."

In Hill *vs.* Sunderland, 3 Vt., 570, the Court says:

"The power to open or vacate judgment is essentially judicial. Therefore, on the great constitutional principle of the separation of the powers and functions of the three departments of Government, it cannot be exercised by the

legislature. While a statute may indeed declare what judgments shall in future be subject to be vacated, or when or how, or for what cause, it cannot apply retrospectively to judgments already rendered and which had become final and unalterable by the court before its passage. Such an act would be unconstitutional and void on two grounds: First, because it would unlawfully impair the fixed and vested right of the successful litigant, and, second, because it would be an unwarranted invasion of the province of the Judicial Department."

Black on Constitutional Prohibitions, Section 199, says:

"In accordance with the principles already announced, it is well ruled that a statute authorizing the opening of judgments rendered since a certain anterior date impairs vested rights and infringes on the Judicial Department of the Government."

And the following authorities support this proposition:

6 Amer. & Eng. Ency. Law, p. 1038, 2nd Ed.;
Freeman on Judgments, Vol. 1, Sec. 90;
Smith Stat. & Const. Law, Sec. 340;
In re Handley, 49 Pac., 829;
Bush *vs.* Williams, 24 Ark., 96;
Martin *vs.* So. Salem Land, 26 S. E., 591;
Story *vs.* Runkle, 32 Tex., 398;
Denny *vs.* Matton, 79 Amer. Dec., 784;
Penn *vs.* Wheeling, Etc., Bridge Co., 18 How., 421;
Merrill *vs.* Sherburne, 8 Amer. Dec., 52;
Stanford *vs.* Barry, 15 Amer. Dec., 691;
Ratcliffe *vs.* Anderson, 31 Amer. Dec., 716;
Burch *vs.* Newberry, 10 N. Y., 374;
Hewitt *vs.* Colorado Springs, 5 Colo., 184.

Sutherland on Statutory Construction, Section 480, says:

"When a right has been perfected by a judgment, the fruits of recovery cannot be diverted by new legislation, nor

subjected to new hazard by giving a new right to appeal or some other mode of review."

Since the adoption of the 5th Amendment to the Constitution, which declares that no person should be deprived of his property without due process of law, Congress has no greater power to make laws which impair vested rights than is enjoyed by State legislature. See

Wade on Retroactive Laws, Secs. 156, 157, 264;
Black on Const. Prohib., Secs. 176, 183, 207;
3 Amer. & Eng. Ency. Law, pp. 756–760, 2nd Ed.;
Lawson's Rights, Remedies & Practice, Vol. 7, Sec. 3850;
Sutherland on Stat. Construction, Sec. 480.
Steampship Co. *vs.* Joliffe, 2 Wall., 450;
Fletcher *vs.* Peck, 6 Cranch., 87;
Wilkinson *as.* Leland, 2 Peters, 657;
Ferguson *vs.* Williams, 13 N. W., 49.

The case of Watson *vs.* Mercer, 8 Peters, 88, does not contravene the above, because it was rendered on a State statute and before the adoption of the 14th Amendment to the Constitution.

Black on Constitutional Prohibitions, Sec. 197, says:

"If the legislature cannot invade the province of the courts by imposing upon them, by retroactive statute, the necessity of adopting a different interpretation of an existing law from that which they had already placed upon it, it follows, *a fortiori*, that the legislature cannot directly control the action of the courts by setting aside their judgments or ordering a reconsideration of adjudications they have duly and formally reached. Hence an act of the legislature awarding a new trial in an action which has been decided in a court of law is unconstitutional." Thus it was said by Chief Justice Gibson: "If anything is self-evident in the structure of our government, it is that the legislature has no power to order a new trial, or to direct the court to order it, either before or after judgment. The power to order new

trials is judicial, but the power of the legislature is not judicial. The legislature has gone no farther than to order a rehearing on the merits; but it is not more intolerable in principle to pronounce an arbitrary judgment against a *suitor than it is injurious* in practice to deprive him of a judgment, which is essentially his property, and to subject him to the vexatious, risk and expense of another contest. Hence it will appear that a statute of this character is not only a practical assumption of judicial power, but is also obnoxious to the provisions which guard vested rights from invasion, and is therefore properly within our subject, and objectionable because of its retroactive effect upon past transactions."

Was the Proceeding Below Due Process of Law?

If it should be held that Congress has the power to create a special tribunal to examine into and nullify the judgments of the regularly constituted courts until the judgments of the courts shall in all things conform to the views of Congress, then we respectfully submit and insist that the law creating the special tribunal, in order to be constitutional and valid, must not compel or even authorize it to proceed in a way that is opposed to what is known as *due process of law*. One of the chief elements going to constitute *due process of law* is that the party against whom the proceeding affecting property is had must be made a party to the proceeding and have notice of it and opportunity to resist it. The courts of the country have in the true spirit of the Constitution been zealously guardful of the rights of private property, and have not hesitated to declare that under the 5th Amendment to the Constitution of the United States Congress cannot deprive a citizen of his property or of the use of the same without *due process of law*, which expression the courts have held to mean as above stated, that Congress could not by enactment disturb or destroy any

person's claim or right to property, without first giving him notice and an opportunity to be heard before a competent tribunal.

Holden *vs.* Hardy, 169 U. S., 366;
Davidson *vs.* New Orleans, 96 U. S., 97;
Craig *vs.* Kline, 65 Penn. State, 399;
Kilburn *vs.* Thompson, 103 U. S., 182;
Hurtado *vs.* People of California, 110 U. S., 535;
Orchard *vs.* Alexander, 157 U. S., 383;
Lowe *vs.* Kansas, 163 U. S., 85.

It is a matter of general information, besides it appears from the record in this case, that there are a large number, in fact over three thousand people, who obtained judgments in the United States Courts for the Central and Southern Districts of the Indian Territory establishing their right to enrollment in the Choctaw and Chickasaw tribes of Indians. These judgments were obtained under the Act of 1896, which provided for appeals in proceedings of that character from the Commission to the Five Civilized Tribes to such courts. The proceedings were instituted under and in accordance with the rules of procedure prescribed by the Interior Department, and such judgments have all of the sanctity and implied verity which usually attach to and inhere in the judgments of our courts. These judgments were more than two hundred in number, that is, there were more than that many cases—each judgment relating alone to a family and its collateral kindred. There was no connection between the judgments or the parties affected thereby. There was no joint or common proceeding, but each case was separate and independent of all other cases, every case resting alone upon its own peculiar facts.

The provisions of the treaty of 1902 under which the proceedings were had against which we here complain, authorized and required the special tribunal known as

the Choctaw and Chickasaw Citizenship Court to hear a proceeding instituted by the Choctaw and Chickasaw Nations against ten persons interested in these judgments to test the validity of the judgments on grounds specially set forth in the treaty; it being provided that the ten persons named in the judgments so selected by the Nations to proceed against, should be the representative of all other persons admitted to citizenship by all the other judgments, and that the judgment rendered in this particular test case should be decisive of the validity of all the judgments.

Now we respectfully submit that whatever subterfuges may have been resorted to in the provisions of this treaty to avoid the plain and simple requirements of the Constitution, and to cover up an actual violation of the constitutional rights of the people interested in all the judgments, except those named in the favored ten persons to be selected by the tribes to be made parties to this particular proceeding, ought not to be allowed to prevail. At least it is nothing but a legislative forfeiture of valuable property rights of a large number of citizens.

As before remarked, it is one of the fundamentals of *due course of law* that the party whose rights are to be affected shall be made a party to the proceeding, shall have notice of the same and an opportunity to appear and defend. Perhaps the universal application of and the reason for this rule and the authorities sustaining it, are nowhere better set forth than in the case of McArthur *vs.* Scott, 113 U. S., 340. We are not unmindful of the exception to this rule, that obtains in equity, that is, where the parties are so numerous that it would be inconvenient to name them all, the proceeding may be begun in the name of a few as representatives of the entire number, and it is possible that this rule also prevails where the defendants are numerous; but it can only prevail where the parties have a general

and common interest and where the parties named can be fairly said to be representative of all the interests involved. Parties having no joint interest cannot be forced in to unnatural relations, and one be made the judicial representative of another.

The persons holding judgments of the United States Courts of the Indian Territory admitting them to citizenship in the Choctaw and Chickasaw tribes have no general or common interests. No family can be said in any proper sense to be the representative of another family. Their original proceedings were separate and distinct, and in no manner associated or connected with each other. It is true that in these proceedings there was a common defendant in a large number of the cases, and it is true that the effect of the judgments was to enroll the applicants as members in one or the other of the tribes; but this does not have, necessarily, the effect of giving them a common interest in this proceeding. It is also true that the provisions of the treaty under consideration provided that all the judgments are to be annulled on either one of two grounds, which are supposed to be common to all the judgments. But this is no answer to our contention that a portion of these defendants cannot be fairly made the representatives of the remainder. The defences to these particular proceedings could easily be various, the parties in one judgment having no connection with and no knowledge of the defense in another.

It is not difficult to imagine that in many of the cases where actual notice was given to but one of the tribes that the other tribe may have appeared in such a way, assisted in the defense in such a manner as to bind it by the litigation; in truth, in a case brought in the Central District to annul the judgment on the identical grounds named in the treaty, in which Duke and others were plaintiffs and Good-

all and others were defendants, alluded to in the petition for writ of prohibition in this case, one of the defenses set up by those who obtained the judgment in that particular case was that the other tribe, while not made a formal party to the suit, and while not given legal notice, was present by its counsel and by its official representatives, and aided, consulted and advised as to the defense in such a way as to bind it. If these facts were true in that particular case, it was a complete answer to the suit in the test case; and if it is true in one case it may be true in many; in fact, it may be a full and complete defense in case of all the judgments other than the ten persons directly involved in the test case. It is a fact beyond dispute that a great number of the cases were tried by the Court upon the record and the same evidence introduced before the Dawes Commission. So an entire stranger might have as well been appointed or selected to represent these people so far as knowledge of or interest in their defenses were concerned, as to have selected part of them to represent the remainder.

The Citizenship Court has declared the judgments void because one-half of the people having clearly a common and joint interest with the others in the alleged subject-matter of the suit were not made parties and given notice of the proceeding; yet the provisions of the treaty under consideration authorizes all the judgments to be set aside by a proceeding, notice of which was not given to exceeding one-fourth of one per cent. of the people interested in them.

An additional reason why this law ought to be held void is, that it is partial or class legislation of the worst character; that it does not apply to and bear equally upon all persons of the same class or similarly situated. It selects ten persons admitted to citizenship and requires that these favored and particular few be given the right and benefit of personal service, but as to the others service is de-

nied, and they must find out about the pending proceeding the best way they can and come into court upon their own motion. The law thereby unjustly discriminating between people belonging to the same general class. This is contrary to the authorities as we understand them and invalidated the entire law. If Congress had the power to omit service as to any of the people interested in these judgments, why could it not serve only one person interested in one particular judgment? Certainly there is no difference in principle, but the latter proceeding would have made it manifest to the dullest mind that the whole scheme of service in this test case proceeding was a foolish farce. The law failing to bear upon all alike does not constitute *due process of law.*

Pennoyer *vs.* Neff, 95 U. S., 714;
Caldwell *et al. vs.* Texas, 137 U. S., 697;
Leper *vs.* Texas, 139 U. S., 468;
Giozza *vs.* Tierman, 148 U. S., 662.
See also Vol. 9, page 336, Rose's Notes on United States Reports.

It is true that the above authorities relate to the provision of the Fourteenth Amendment as applied to the acts of State legislatures, but it has more than once been held that the Fifth Amendment places the same restraint upon Congress that the Fourteenth Amendment does upon the State legislature. The language of the two Amendments in this particular being substantially similar, the meaning of the two is the same.

The tribes should not be allowed in this proceeding to evade the full force and application of these wholesome constitutional provisions on the ground that the person obtaining the judgments acquired no property rights thereby. The truth is that they are in no situation to make such a contention here, for an examination of the judgment and decision of the Citizenship Court will show that the oft-repeated

reason assigned in the opinion for holding these judgments void for lack of service on both tribes was that the judgment conferred valuable property rights. But if this were not true, the contention could not prevail in this controversy. While it is true that this Court in the case of Stevens *et al. vs.* Cherokee Nation, 174 U. S., 445, held that such judgments conferred no absolute property right, this decision was overruled and its reasoning entirely swept away by the Citizenship Court in the test case when that court came to illuminate the subject by its "more perfect" wisdom. But if this Court should still be inclined to think that the doctrine in Stevens *vs.* Cherokee Nation is still the law, we submit that long before the institution of this particular proceeding, and even before the enactment of the law that created the Citizenship Court, the judgments had ripened into and had become the instrument of conferring or securing valuable and absolute property rights. The act known as the Curtis Act, approved June 28, 1898, in the eleventh section provided that the roll of citizenship so made by the Dawes Commission (which necessarily included the people who obtained these judgments), should be the final roll of membership in said tribes and that each member of the tribe whose name appears upon the roll should be entitled to an interest in the land and to have the same allotted to him in severalty. Section 16 of the same Act provided that a member of the tribe could immediately enter into the possession of his portion of said land and occupy, use and rent the same, even before allotment.

30 Stat. at L., pp. 505–507;
People *vs.* Otis, 90 N. Y., 48;
St. Louis *vs.* Bar, 41 S. W., 1098;
Holden *vs.* Hardy, 169 U. S., 366.

We think it clear that at the time of the enactment of the treaty and the law under which the Citizenship Court

proceeded, that all the conditions and legal requirements existed to make the property rights of such persons as obtained judgments enrolling them as members of the tribes, within the protection of the constitutional provisions under discusion. We therefore respectfully submit that if this law is invalid and unconstitutional for no other reason than the lack of notice, the same should be held invalid for that reason alone.

The Act of June 28, 1898, known as the Curtis Bill or Atoka Treaty (p. 505, 30 Stat.), provides, "That all the lands within the Indian Territory belonging to Choctaw and Chickasaw Tribes shall be allotted to the members of said tribes so as to give to each member so far as possible a fair and equal share thereof, considering the character and fertility of the soil and the location and value of the land."

More than a year prior to this, the petitioner, Joins, had by the judgment of the United States Court in the Indian Territory been determined to be a member of the Chickasaw Tribe.

At the time the Choctaws and Chickasaws agreed to this treaty it was known that Joins was a member of the tribe, pronounced so by the judgment of the court. The tribes having agreed that lands should be allotted to him under this treaty, and he, acting upon the good faith of this treaty, having erected improvements upon the lands selected by him to the value of fifteen thousand dollars, the Choctaw and Chickasaw Nations are now estopped to assert that the petitioner is not a member of Chickasaw Tribe.

The grounds of an estoppel against a State may be drawn either from the acts or omissions of its public officers or from the action of its legislature and likewise against these tribes by the action of their commissioners, in making the treaty above referred to. Good faith should characterize the conduct of these tri e in their dealings with the petitioner

and the law will not exempt them from the doctrine of estoppel; like a private person they may be estopped by their acts, silence, consent or acquiescence.

See People *vs.* Stephens, 71 N. Y., 527;
Lindsay *vs.* Haws, 2 Black, U. S., 554;
State *vs.* Milk, 11 Fed., 389;
State *vs.* Flint, 89 Mich., 481;
Sanders *vs.* Hart, 57 Texas, p. 8;
State *vs.* Dint, 18 Mo., 313;
Alexander *vs.* State, 56 Ga., 478, and 49 Mo., 216.

Again, this treaty having provided that the lands of the two tribes should be alloted among the members of the tribes, and petitioner being at that time a member of the tribe, he took by the treaty the fee-simple title to his proportionate share of the Indian lands, as much so as if he had been named in the treaty. In other words, the treaty converted the Indian lands into individual property, and acted as a direct conveyance to the petitioner of his proportion of the tribal land. It does not matter that at that time the lands of petitioner had not been segregated from the common holdings, the treaty itself was a conveyance to petitioner of his interest in the lands, and all that remained to be done was the mechanical work of surveying and allotting to petitioner his proportionate share, in accordance with the provisions of said treaty, and executing to him the patent for the same.

The case of Jones *vs.* Mehan, 175 U. S., p. 1, settles this question conclusively. It was there held under a treaty similar in many of its provisions to the one under consideration, that the members of the tribe took directly by the treaty the fee-simple title to their respective property, notwithstanding the property was thereafter to be designated and segregated from the common holdings.

We think that it is clear that this treaty vested in the petitioner the fee-simple title to his proportionate share of

the lands and that same at that date became and now is a vested right and cannot be disturbed. This, we contend, has ripened into a vested right by the passage and ratification of said treaty and that a destruction of his citizenship destroys his right and title to this property. That under the laws and treaties between the United States and these tribes one cannot hold or have allotted to him his portion of these lands without being a citizen or member of the tribe, and if a citizen or member of the tribe, he cannot be deprived of his interest.

In the consolidated case of Stevens *vs.* Cherokee nation, the case of Joins (the petitioner in the present case), No. 487, this Court expressly decided that on the appeal from the Dawes Commission to the United States Court, that this and similar cases were to be tried *de novo*. This question having already been decided by this Court, Congress had no constitutional power to establish another and inferior tribunal and submit to it the determination of a question already passed upon by this Court.

(Stevens case, 174 U. S., pp. 445–492.)

The Constitution never intended that there should be but one Supreme Court (see U. S. *vs.* O'Grady, 89 U. S., p. 641), and when Congress undertook to create another tribunal to review this court it violated one of the fundamental principles of this Government. The statute that we complain of expressly says that this Citizenship Court shall determine whether or not these cases should have been tried "*de novo*," notwithstanding this Court in the Stevens case, after reviewing all the acts of the legislature and treaties with these tribes, held that the trial of these cases de novo by the courts in the Southern and Central districts were regular and proper, and we might say settled the notice proposition submitted to the Citizenship Court, for the act that this Court upheld and said was valid, did not provide for the notifying

of either nation or the making of either nation parties, but only required applicant to apply to the Dawes Commission for admission. So we conclude that if it was necessary to serve either or both of said nations in order to acquire citizenship, that this Court would have declared that the act that did not require either invalid and unconstitutional and that this Court in upholding said act in effect held that notice to both nations was not necessary to the validity of said judgments, and Congress had no power to create another tribunal to enquire into the same.

In the brief filed by the United States, pp. 15–16, it is insisted that because the Citizenship Court rendered its decree in the test suit, of which petitioner complains, December 17, 1902, prior to the institution of the prohibition proceeding herein, and certified the same to the Dawes Commission that such decree had become final, and had had its full effect and was entirely beyond the control of the said Citizenship Court at the time the petition was filed herein; and that as the effect of said decree was to cancel and annul the judgments rendered by the United States Courts in the Indian Territory under the Act of Congress, June 10, 1896, *supra*, and as such decree was and is self-executing no further action in the said test suit on the part of the Citizenship Court was necessary to give effect to said decree. And it is further contended that on account of the further provisions in Section 31 of the Act as follows:

"In the event said citizenship judgments or decisions are annulled or vacated in the test suit hereinbefore authorized, because of either or both of the irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers and proceedings in any citizenship case in which judgment or decision is so annulled or vacated, shall upon written application therefor, made within ninety days thereafter by any party thereto, who is thus deprived of a favorable judgment upon his claimed citizenship, be transferred and

certified to said Citizenship Court by the Court having custody and control of such files, papers and proceedings, and upon the filing in such Citizenship Court of the files, papers and proceedings in any such citizenship case, accompanied by due proof that notice in writing of the transfer and certification thereof has been given to the chief executive officer of each of said nations, said citizenship case shall be docketed, in said Citizenship Court, and such further proceedings shall be had therein in that Court *as ought to have been had in the Court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and as if no judgment or decision had been rendered therein.*"

That the proceedings therein provided for are not only separate and distinct from the test suit provided for in the said section, but wholly dependent upon the voluntary action of each and every individual whose judgment was so annulled and vacated. We do not concur in this interpretation thus announced, but to the contrary insist that by the plain terms of said Section 31 of the Act the power of the Citizenship Court to entertain jurisdiction of cases transferred to it necessarily, and as a condition precedent depends upon the validity of the decree rendered in the test suit, and that said Citizenship Court must continuously recognize and give effect to said decree else it has not the power or jurisdiction under the Act to try cases thus transferred to it. By the terms of the Act of June 10, 1896, as shown in the petition (21), the petitioner obtained from the United States Court for the Southern District of the Indian Territory a decree establishing his right to be recognized and enrolled as a member of the tribe of Chickasaw Indians, and directing the Dawes Commission to enroll him as such. From this decree, under Act of Congress, July 1, 1898 (30 Stat. at L., 590), the Chickasaw nation appealed directly to this honorable Court and by this Court said decree was affirmed. The effect of which was to place the name of petitioner upon the roll of Chickasaw citizenship then be-

ing made by said Commission pursuant to the Act of June 10, 1896, cited *supra*. (See Stephens *vs.* Cherokee Nation, 174 U. S., 446.) The effect of the certification of the decree in the test case, complained of, to the Dawes Commission is to direct and command said Commission to erase from the roll of Chickasaw citizenship the name of petitioner. And we do most respectfully submit if the said Commission should refuse or decline to thus erase the name of petitioner from the roll of Chickasaw citizenship, that said Citizenship Court by proper order made in said test case could compel said Commission to give effect to its said decree. We therefore seriously insist the power and control of said Citizenship Court over the decree in the test case has not ceased, and had not ceased at the time petitioner filed his petition herein for writs of prohibition and *certiorari*.

It is further contended by the United States, that because respondents in their answer say that petitioner, subsequent to filing his petition herein, has transferred his case to the Citizenship Court as is provided by Section 31, of the Act cited *supra*, that he has thereby waived the question of jurisdiction raised in his petition, but we submit that as the decree in the test case had been rendered at the time the petition herein was filed, that this honorable court in determining the jurisdiction and power of the Citizenship Court, in rendering the decree in the test case, will only look to and consider the record in said cause.

(Huguley Mfg. Co. *vs.* Gallatin, 175 U. S., 726; 143 U. S., 504; 36 C. C. A., 236.

It is clear therefore from the decisions last cited that as petitioner by this proceeding undertakes to prevent the effects of the judgment complained of that he would not be permitted to show by the evidence *aliunde*, the want of jurisdiction of the Citizenship Court in the test case, but must depend solely upon the record to establish such want of

jurisdiction. Why not the converse rule prevail? We further seriously insist if the Citizenship Court acted without jurisdiction in the test case because of the unconstitutionality of Section 31 complained of, that by consent of parties, the subsequent voluntary act of petitioner, the said act could not be made constitutional and a valid Citizenship Court thereby created with power to hear and determine the cause complained against.

It is also contended by the United States that the Citizenship Court acted in a political and not a judicial capacity, and in support of this proposition it cites Cherokee Nation *vs.* Hitchcock, 187 U. S., 294; Stephens *vs.* Cherokee Nation, 174 U. S., 446; Lone Wolf *vs.* Hitchcock, 187 U. S., 558; but a careful reading of these decisions does not show that this honorable Court has ever yet held that when a court is created, upon which jurisdiction is conferred to enquire into and judicially pass upon controversies submitted to it of a purely legal nature, and when such judicial inquiry is made and final adjudications had that the executive branch of the government, as such, can enquire into, cancel and set aside such judgments so rendered.

For reasons stated in the foregoing brief, as well as reasons stated in original brief filed herein, we respectfully submit that the petition for writs of prohibition and *certiorari* of petitioner should be granted as prayed in the petition.

WM. I. CRUCE,
CALVIN L. HERBERT,
Counsel for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 14—Original.

EX-PARTE: IN THE MATTER OF U. S. JOINS, *Petitioner.*

Demurrer of Petitioner to Reply, Answer and Return to Rule to Show Cause.

And now comes the petitioner, U. S. Joins, by his attorneys, and demurs to the reply, answer and return to the rule to show cause, filed herein August 24, 1903, by the respondents, the Honorable Spencer B. Adams, chief judge, the Honorables Walter L. Weaver and Henry S. Foote, associate judges, and James B. Cassada, clerk of the Choctaw and Chickasaw Citizenship Court, and as ground of demurrer the petitioner says:

First. Said answer, reply and return of the respondents does not show any lawful reason why writs of prohibition and certiorari against the respondents should not be granted by this honorable court for reasons stated and as prayed for in the petition.

Second. Petitioner specially demurs to paragraph one of the reply, answer and return of respondents because respondents attempt to avoid the issuance of the writs of prohibition and certiorari as prayed for in the petition solely on the ground that the judgment rendered by said Citizenship Court, December 17, 1902, in the cause pending on the docket thereof entitled the Choctaw and Chickasaw Nations

vs. J. T. Riddle, *et al.*, had become final, and, by said court, had been certified to the Commission of the United States to the Five Civilized Tribes prior to the filing herein the petition for writs of prohibition and certiorari.

Third. Petitioner further and specially demurring to said answer, reply and return of respondents says that paragraph two thereof states no lawful reason why the writs of prohibition and certiorari should not issue against them as prayed for in the petition in that respondents attempt to show only that the petitioner subsequent to the institution of the proceedings herein has estopped himself from questioning the jurisdiction of said Citizenship Court, and the constitutionality of Section 31 of the Act of Congress creating it, by voluntarily transferring to said Citizenship Court all the files, papers and proceedings in the cause of U. S. Joins *vs.* Chickasaw Nation theretofore filed and pending in the United States Court for the Southern District of the Indian Territory, sitting at Ardmore, and in which petitioner had under the Act of Congress of June 10, 1896, obtained a judgment establishing his identity as a member of the tribe of Chickasaw Indians.

And because the record herein does not show that petitioner transferred said cause to said Citizenship Court subsequent to the filing of the petition herein.

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